Awang Osen bin Awang Mat v Norhazlena bte Abdurani & Ors

HIGH COURT (BINTULU) — ORIGINATING SUMMONS NO 24–91 OF 2003 (BTU)
ABDUL AZIZ ABDUL RAHIM JC
26 JANUARY 2004

Land Law — Indefeasibility of title and interests — Transfer — Transfer of native's rights and interest over land to a non-native — Whether memorandum of transfer and powers of attorney improper and illegal — Whether transfer valid — Whether title indefeasible — Sarawak Land Code ss 132(1), 133(1), 134(1) & (2)

Land Law — Indefeasbility of title and interest — Fraud — Plaintiff signed blank power of attorney and memorandum of transfer — Whether there was allegation of fraud — Whether power of attorney and memorandum of transfer valid

Native Law and Custom — Land dispute — Native title — Transfer of native's rights and interests over land to a non-native — Whether prohibited by law — Whether non-native could acquire good title — Sarawak Land Code s 8 — Contracts Act 1950 s 24

The plaintiff was the registered proprietor of a certain parcel of land in native area land ('the said land'). In May 1999, he was brought by his son to the office of Messrs Yi & Co to sign several documents that he later realised consisted of a blank power of attorney and a blank memorandum of transfer. Upon the plaintiff's inquiry, the plaintiff discovered that the said land had been transferred to various people vide the said documents without the plaintiff's consent or permission. Thus, the plaintiff sought to declare the following documents to be null and void: (i) the power of attorney instrument no. L2413/2000 ('the first PA'); (ii) the deed of substitution of power of attorney instrument no. L2195/1999 ('the second PA'); (iii) the memorandum of transfer instrument no. L5705/2001 ('the MOT'); and (iv) the power of attorney instrument no. L5706/2001 ('the third PA'). The plaintiff contended that since the first PA was to transfer a native's rights over the said land to a non-native, it was void by virtue of s 8(b) of the Sarawak Land Code ('the Code') and s 24(a) and (b) of the Contracts Act 1950 ('the Contracts Act'); and by virtue of s 8(e) of the Code, the plaintiff's rights over the land remained intact and by virtue of s 66 of the Contracts Act, the first defendant ought to return the land to the plaintiff.

Held, partially allowing the plaintiff's application:

(1) The first PA effectively transferred all rights and interests over the said land in native land area to a non-native which is prohibited by s 8(b) of the Code and is caught by s 24 of the said Contracts Act. However, the prohibition in s 8 of the said Code is not an absolute prohibition. Non-natives can still acquire rights over native land provided it is specially authorised by the Yang Dipertua Negeri in Council (*Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379). Since the donee ('Moi') did not fall within this category, it follows therefore that Moi could not acquire good title to pass on to subsequent donees (see para 14).

(2) The indefeasibility of title was not defeated by the illegality of the document or instrument of title (*Adorna Properties Sdn Bhd v Boonsoom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241). Under the Code registration by void instrument does not affect indefeasibility of title. Unlike s 340 of the National Land Code ('NLC') which is applicable in Peninsular Malaysia, s 132 of the said Code does not have the equivalent of s 340(2)(b) of the NLC. The latter clearly provides that registration obtained by a void instrument could not confer indefeasibility of title on the registered proprietor (see para 23).

(3) The registration conferred on the registered proprietor an indefeasibility of title. In so far as it related to the Code, it is manifested in s 132. Though the indefeasibility of title may be challenged on the ground of fraud, such ground cannot be used to defeat a title acquired by a registered bona fide purchaser and for value (see para 24).

(4) In this case, there was no allegation of a fraudulent act by the first defendant in obtaining title to the said land. What was alleged against the first defendant was that the instrument by which she acquired the title through registration of the MOT that was improper and illegal. Such allegation could not, by virtue of ss 133 and 134(2) of the Code be held against the first defendant whose claim that she was a bona fide purchaser for value has not been challenged. The combined effect of ss 132(1), 134(1) and 133(1) of the Code is that fraud, if proven, was the only ground that can defeat a registered proprietor's title. Since no fraud was alleged against the first defendant, therefore, the first defendant, as registered proprietor had a good and indefeasible title to the said land (see paras 25–26).

[Bahasa Malaysia summary

Plaintif adalah tuanpunya berdaftar beberapa bidang tanah di tanah kawasan anak watan ('tanah tersebut'). Pada bulan Mei 1999, beliau telah dibawa oleh anak lelakinya ke pejabat Tetuan Yi & Co untuk menandatangani beberapa dokumen-dokumen yang kemudiannya disedari mengandungi surat kuasa wakil kosong dan memorandum pindahmilik kosong. Melalui siasatan plaintif, beliau mendapati bahawa tanah tersebut telah dipindahmilik kepada beberapa orang melalui dokumen-dokumen tersebut tanpa persetujuan dan kebenaran beliau. Oleh itu, plaintif telah memohon untuk mengisytiharkan dokumen-dokumen tersebut adalah terbatal dan tidak sah: (i) suratcara surat kuasa wakil no. L2413/2000 ('SKW pertama'); (ii) suratikatan penggantian suratcara surat kuasa wakil no. L2195/1999 ('SKW kedua'); (iii) suratcara borang pindahmilik no. L5705/2001 ('BP'); dan (iv) suratcara surat kuasa wakil no. L5706/2001 ('SKW ketiga'). Plaintif menegaskan bahawa oleh kerana SKW pertama adalah untuk memindahkan hak-hak anak watan ke atas tanah tersebut kepada bukan anak watan, ia adalah tidak sah menurut s 8(b) Kanun Tanah Sarawak ('Kanun tersebut') dan s 24(a) dan (b) Akta Kontrak 1950 ('Akta Kontrak'); dan menurut s 8(e) Kanun tersebut, hak plaintif ke atas tanah itu tidak terjejas dan menurut s 66 Akta Kontrak, defendan pertama hendaklah memulangkan semula tanah itu kepada plaintif.

Diputuskan, membenarkan sebahagian daripada permohonan plaintif:

(1) SKW pertama telah memindahkan secara berkesan semua hak-hak dan kepentingan ke atas tanah tersebut di kawasan tanah anak watan kepada bukan anak watan yang dilarang oleh s 8(b) Kanun tersebut dan dirangkumi oleh s 24 Akta Kontrak. Walau bagaimanapun, larangan di dalam s 8 Kanun tersebut bukanlah larangan mutlak. Bukan anak watan masih boleh mendapatkan hak-hak ke atas tanah anak watan dengan syarat diberi kuasa secara khusus oleh Yang Dipertua Negeri (*Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379). Oleh kerana penerima ('Moi') tidak jatuh di dalam kategori ini, maka Moi tidak boleh mendapat hakmilik sempurna untuk memindahkan kepada penerima berikutnya (lihat perenggan 14).

(2) Hakmilik yang tidak boleh disangkal tidak gagal oleh kepenyalahan undang-undang dokumen dan suratcara hakmilik (*Adorna Properties Sdn Bhd v Boonsoom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241). Di bawah Kanun pendaftaran dengan suratcara yang tidak sah tidak menjejaskan hakmilik yang tidak boleh disangkal. Tidak seperti s 340 Kanun Tanah Negara ('KTN') yang terpakai di Semenanjung Malaysia, s 132 Kanun tersebut tidak menyamai s 340(2)(b) KTN. KTN memperuntukan dengan jelasnya bahawa pendaftaran yang didapati melalui suratcara terbatal tidak boleh memberikan hakmilik yang tidak boleh disangkal ke atas tuanpunya berdaftar (lihat perenggan 23).

(3) Pendaftaran telah memberikan tuanpunya berdaftar hakmilik yang tidak boleh disangkal. Sejauh mana ia berkait dengan Kanun tersebut, ia dimanifeskan di dalam s 132. Walaupun hakmilik yang tidak boleh disangkal boleh dicabar atas alasan fraud, alasan itu tidak boleh digunakan untuk mengatasi hakmilik yang diperolehi oleh pembeli berdaftar bona fide dan untuk nilai (lihat perenggan 24).

(4) Di dalam kes semasa, tidak terdapat pertuduhan perbuatan fraud oleh defendan pertama dalam memperolehi hakmilik tanah tersebut. Apa yang telah dikatakan terhadap defendan pertama adalah bahawa suratcara yang dengannya beliau telah memperolehi hakmilik melalui pendaftaran BP yang tidak betul dan tidak sah. Pengataan itu tidak boleh, menurut ss 133 dan 134(2) Kanun tersebut disabitkan ke atas defendan pertama yang tidak dicabar dakwaannya bahawa beliau adalah pembeli bona fide untuk nilai. Kesan gabungan ss 132(1), 134(1) dan 133(1) Kanun tersebut ialah fraud, jika dibuktikan, adalah satu-satu alasan yang boleh mengatasi hakmilik tuanpunya berdaftar. Oleh kerana tiada fraud yang dituduh terhadap defendan pertama, oleh itu, defendan pertama, sebagai tuanpunya berdaftar mempunyai hakmilik yang sempurna dan tidak boleh disangkalkan (lihat perenggan 25–26).]

Notes

For cases on transfer under indefeasibility of interest, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2566.

For cases on fraud under indefeasibilty of interest, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2509–2532.

For cases on native title, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) para 645.
For indefeasibility in Sarawak, see 8 *Halsbury's Laws of Malaysia*, paras [150.192] – [150.193].
For fraud under indefeasibility in Sarawak, see 8 *Halsbury's Laws of Malaysia*, para [150.191].
For native titles in Sarawak, see 8 *Halsbury's Laws of Malaysia*, para [150.539].

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit [2001] 1 MLJ 241 (refd)
Dato Haji Nik Mahmud Daud v Bank Islam Malaysia Bhd [1998] 3 MLJ 393 (refd)
Frazer v Walker & Ors [1967] 1 All ER 649 (refd)
Kho Kwang Choon v Phuman Singh [1968] 1 MLJ 183 (refd)
Law Tanggie v Untung ak Gantang & Anor [1993] 2 MLJ 530 (dist)
Manang Lim Native Sdn Bhd v Manang Selaman [1986] 1 MLJ 379 (refd)
Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor [2002] 6 MLJ 236, [2002] 8 CLJ 751 (folld)
Runin ak Pangau & Anor (suing as co-administratrix and beneficiaries of the estate of Pangau ak Nyelau @ Panggau ak Nyadau also spelt as Panggau ak Nyandau (deceased)) Both Rh Ghaggan, Selabit, Sebauh v Gerada (f) ak Bana & Anor [2000] 4 AMR 4415 (refd)
Wee Tiang Peck v Teoh Poh Tin [1995] 1 MLJ 446 (refd)

Legislation referred to

Contracts Act 1950, ss 2, 24, (a), (b), 66
National Land Code s 340, (2)(b)
Sarawak Land Code (Cap 81), ss 8, (a), (b), (d), (e), 9, 132, (1), 133, (1), 134, (1), (2)

Musa Dinggat (Musa Dinggat Advocates) for the plaintiff.
KY Lin (Kadir, Wong, Lin & Co Advocates) for the defendants.

Abdul Aziz Abdul Rahim JC:

[1] The brief of facts of the case are as follows.

[2] The plaintiff was the registered proprietor of all that parcel of land in the Native Land Area containing an area of approximately 5.585 hectares situated as Sungai Mas Bintulu and described as Lot 584 Block 35 Kemena Land District (formerly described as Lot 1500 Kemena Land District). Sometime in May 1999, the plaintiff's son by the name of Awang Khusairi was in need of cash money amounting to RM20,000. The plaintiff then was brought by his son to Miri to borrow RM20,000 whereon he was brought to office of Messrs Yi & Co when he was asked to and did sign several documents and a sum of RM19,000 was passed and received by the plaintiff's son. Asum of RM1,000 was deducted being the interest charged for the purported loan. It was agreed by all parties that the said sum was only loan and the said land was only pledged as a surety for the loan. The plaintiff was then asked to leave and did leave the original title of the said land with the legal firm

but the plaintiff kept the rent book for the said land to enable him to continue paying the land rent in Bintulu. The plaintiff alleged that he could not read or understand English and alleged that he believed that the documents signed by him were loan documents. It was later that the plaintiff realised that thedocuments signed by him was a blank power of attorney and a blank Memorandum of Transfer. Upon the plaintiff's inquiry, the plaintiff discovered that the said land had been transferred to various people vide the said documents without the plaintiff's consent or permission. By the said Memorandum of Transfer, the said land was transferred to one Setia bte Dullah for a sum of RM27,000 but this transfer was never registered. By a purported Power of Attorney, an irrevocable Power of Attorney was given to one Moi Yew Khoo, a Chinese, vide instrument no. L2413/1999 and registered at the Bintulu Land Registry on 19 June 1999. Then the said Power of Attorney was replaced by a deed of substitutions of Power of Attorney under instrument no. L2195/1999 and registered at the Bintulu Land Registry on 14 April 2000 whereon Moi Yew Khoo was substituted as plaintiff purported attorney by Antonio Sim Peak Khiang and Chee Seng Hee. By the said deed of substitution of Power of Attorney, the said land was transferred to the first defendant under instruments no. L5705/2001 and registered at the Bintulu Land Registry on 8 October 2001. By a Power of Attorney instrument no. L57000/2001 registered at the Bintulu Land Registry on 8 October 2001, the first defendant granted a Power of Attorney to the second, third, fourth, fifth and sixth defendants.

[3] Therefore in this case, the plaintiff seeks to declare null and void the following documents namely:

a) Power of Attorney Instrument no. L2413/1999 registered at Bintulu Land Registry on 19 June 1999 ('the first PA');

b) Deed of substitution of Power of Attorney Instrument no. L2195/2000 registered at Bintulu Land Registry on 14 April 2000 ('the second PA');

c) Memorandum of Transfer Instrument no. L5705/2001 registered at Bintulu Land Registry on 8 October 2001 ('the MOT');

d) Power of Attorney Instrument no. L5706 registered at Bintulu Land Registry on 8 October 2001 ('the third PA').

[4] The plaintiff also prays that the first defendant unconditionally reconvey Lot 584 Block 35 Kemena Land District (formerly Lot 1500 Kemena Land District) to the plaintiff. The plaintiff grounded his application on illegality and is relying on s 8 of the Sarawak Land Code ('the Code') and s 24(a) and (b) of the Contracts Act 1950 ('the Contracts Act'), saying that he is a native; the land is native land and the instruments were purported to transfer the interests in the land to non-native (see para 11 of plaintiff's affidavit).

[5] The first defendant responded to the plaintiff's claim by stating that:

a) she is a native and therefore s 8 of the Code does not apply (para 5 of the first defendant's affidavit);

b) the transfer has been registered in her name. Thus she acquired indefeasibility of title, even if the instruments were void, by virtue of s 134(2) of the Code, (para 5 of the first defendant's affidavit);

c) she is a bone fide purchaser for value (paras 6.1 and 6.5 of the first defendant's affidavit);

d) there is no allegation of fraud against her.

[6] Section 8(a) of the Code, prohibits non-natives from acquiring any rights or privileges over any native land area (which is the case here), native customary land or interior area land. Section 8(b) of the Code provides that any agreement purportedly to transfer or convey any such rights or privileges shall be deemed to have been entered into for an illegal consideration and that any consideration given shall not be recoverable in any court and that no relief shall be given to any person claiming benefit under the instruments except as provided under s 8(d), which is not relevant to this instant case, of the Code. Section 8(e) of the Code then provides that rights and privileges of any natives shall not be adversely affected by any agreement mentioned in s 8(b) of the Code.

[7] Section 24(a) and (b) of the Contracts Act provides that the consideration or object of an agreement is lawful unless it is forbidden by law or it is of such nature that, if permitted, if would defeat any law. The section goes on to provide that if the object or consideration is unlawful, then the agreement is void.

[8] The consequence of a void contract is provided in s 66, of the Contracts Act which stipulates that any person who has received any advantage under a void agreement or contract is bound to restore the advantage/benefit and to make compensation for it.

[9] Thus the plaintiff contends that since the first PA was to transfer the natives' right over native land area to non-natives, the PA is void by virtue of s 8(b) of the Code and s 24(a) and (b) of the Contracts Act; and by virtue of s 8(e) the rights of the plaintiff over the land remain intact and by virtue of s 66 of the Contracts Act, the first defendant ought to return the land to the plaintiff.

[10] In *Pawa ak Ajah v Chung Kok Chiang @ Chong Kok Kiong & Anor* [2002] 6 MLJ 236, [2002] 8 CLJ 751, Skinner J, in dealing with ss 8 and 9 of the Code, said at p 251:

> From my reading of the provisions of ss. 8 and 9 of the Code, the intention of the Code, which cannot be any more plainly stated than in those two sections, is directed at prohibiting and preventing any person who is non-native of Sarawak from acquiring any rights or privileges over native area land, except in the very limited circumstances permitted by the Code. And to prevent evasion, any agreement that is entered into which would result in such rights and privileges being enjoyed by a non-native is deemed to have been entered into for an illegal consideration and exposes the parties thereto to a penal sanction as well.

[11] On the Power of Attorney executed in *Pawa*, the same learned judge had this to say at p 253:

> I would also say that the execution of the power of attorney has resulted in those rights and privileges I have just mentioned being' enjoyed and exercised by the first defendant. From the extent of the rights and privileges which have been granted over the said land under the power of attorney to the first defendant, it is very apparent that practically every right and privilege, except the nominal ownership in the said land, has been parted with by Nyanau. Thus, although the power of attorney states that the first defendant acts on behalf of Nyanau in exercising those rights, in reality they had passed to and were exercised and enjoyed by the first defendant. The power of attorney was, in my view, a colourable device entered into to facilitate an evasion of the Code and in fact deemed to be entered into for an illegal consideration under s 8(b) of the Code.

[12] In *Pawa's* case, one Nyanau ak Bunya, a native, was the registered proprietor of the land in question. In 1991 he created a PA in respect of the land in favour of the first defendant in that case. The first defendant then sold the land to the second defendant and executed a Memorandum of Transfer in respect thereof. But the Memorandum of Transfer was never registered. Following his death in 1998, the plaintiff, the widow and administratrix of Nyanau's estate applied for declaration that the PA and the unregistered Memorandum of Transfer were null and void having contravened s 8 of the Code as well as ss 2 and 24 of the Contracts Act 1950.

[13] In this instant case too, the power of attorney was purportedly executed by a native donor, the plaintiff, in favour of a non-native donee, one Moi Yew Khoon, purportedly empowering the donee to exercise the rights over the said land on behalf of the donor. But having perused the provisions in the power of attorney I find that the donor is only a nominal owner. It is pertinent to note that the first PA is an irrevocable PA. The real rights and privileges over the land are vested with the donee. Therefore, in this case, I am of the same view as that of Skinner J that the power of attorney is a colourable device to evade the provisions of the Code namely s 8 of the Code.

[14] Thus, following the reasoning and decision of Skinner J in *Pawa ak Ajah* I hold that the first PA effectively transferred all rights and interests over the said land in native land area to a non-native — a Chinese; something that is prohibited by s 8(b) of the Code. So in my view the first PA is caught by s 24 of the Contracts Act. The donee under the first PA ie Moi Yew Khoon is non-native; she being a Chinese. It is noted also that the prohibition in s8 of the Code is not an absolute prohibition. Non-natives can still acquire rights over native land provided it is specially authorised by the Yang Dipertua Negeri in Council (see *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379). Obviously the donee ie Moi is not a category of person referred to in *Manang*. There is no evidence to show otherwise; and the first defendant also did not say or claim that Moi is such category of person.

[15] I also find that the first PA that was executed in favour of Moi by the plaintiff is not one that comes within the ambit of the decision in *Law Tanggie v Untung ak Gantang* & *Anor* [1993] 2 MLJ 530, a judgment by Richard Malanjum JC, which held that if the arrangement is not with the intention

to evade the provisions of the law then the arrangement cannot be faulted. It is only where the arrangement is made to evade the Code that such arrangement will be cut down (*Dato Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446). In this particular instant the first PA is a direct contravention of s 8 of the Code.

[16] Since the first PA is illegal, it follows therefore that Moi cannot acquire good title to pass on to subsequent donee.

[17] On the same premises, the Deed of Substitution of Power of Attorney (the second PA) executed by Moi Yew Khoon, as attorney for the plaintiff (exh D in the plaintiff's affidavit) to transfer the rights and interests in subject land to non-natives namely one Antonio Sim Peck Khiong and Chee Seng Hee, both of Chinese origin, is invalid for contravening s 8(b) of the Code. In the circumstances the subsequent second PA could not also pass good title to its recipient. It follows therefore that the Antonio and Chee could not acquire or pass good title over the subject land to the first defendant. Thus the MOT (exh F in the plaintiff's affidavit) executed by Antonio and Chee in favour of the first defendant is bad in law and void.

[18] Having come to that conclusion; does the court has jurisdiction to grant the second prayer by the plaintiff ie to reconvey the land back to the plaintiff after the first defendant has been registered as the registered proprietor?

[19] Counsel for the plaintiff submitted that the doctrine of indefeasibility of title under s 132(1) of the Code is not absolute. It was contended that the opening words of that section which reads 'subject to this Code' suggest that the indefeasibility of title under the Code could be challenged on grounds other than fraud. It was suggested that one of the grounds is illegality because s 8 of the Code is very specific about illegalities. Reliance was placed on *Runin ak Pangau & Anor (suing as co-administratrix and beneficiaries of the estate of Pangau ak Nyelau @ Panggau ak Nyadau also spelt as Panggau ak Nyandau (deceased)) Both Rh Ghaggan, Selabit, Sebauh v Gerada (f) ak Bana & Anor* [2000] 4 AMR 4415 in which Sulaiman Daud JC (as he then was) held that notwithstanding the provision of s 132 of the Code a registered title may be made defeasible on grounds other than fraud, such as binding interests and equities. Learned counsel for plaintiff also cited *Pawa* and contended that the instant case is on all fours as in *Pawa*. However in *Pawa* it is to be noted that the court was dealing with the MOT that was not registered. This is apparent from one of the prayers sought in that case which is a declaration that the unregistered Memorandum of Transfer dated 8 June 1997 is invalid, null and void. The non-registration of the MOT in *Pawa* is also obvious from the following passage of the learned judge's judgment which appears at p 243 of the report. It reads:

> When the application came on for hearing, it became apparent to me from what was disclosed in the affidavits filed and the submissions of counsel for the plaintiff, that issues raised between the plaintiff and the first defendant affected the position of Regina Mado because the plaintiff was seeking to have the Power of Attorney declared invalid and void, and any decision I may make thereon would definitely

affect her claims to the said land as *the unregistered memorandum of transfer* which she relies upon for her entitlement to a beneficial interest in the said land was executed by the first defendant on the strength of the Power of Attorney, the validity of which is now being attacked in these proceedings.". (Emphasis added.)

[20] It is plain that in *Pawa* there is no issue of a defendant, being a registered proprietor, to reconvey the land which has been registered in his/her name to the plaintiff on the ground that the registration of the title in defendant's name was pursuant to a void instrument as in this instant case.

[21] At this juncture, it may be observed that s 132(1) of the Code provides that the registered proprietor of any estate or interest in land to which the section applies, holds such estates or interest subject to the interest noted on the Register, and he holds so free from all other interests. This is the doctrine of indefeasibility of title entrenched in s 132. However there are certain exceptions to this doctrine and these exceptions, in so far as they relate to s 132 of the Code, are mentioned in the section itself. But none of the exceptions applies in this instant case.

[22] Furthermore, s 134(2) of the Code gives a person indefeasible title once it is registered (see *Kho Kwang Choon v Phuman Singh* [1968] 1 MLJ 183). A registered bona fide purchaser for value, and in the absence of fraud, may claim good title. In this regard it is pertinent to note that under s 133 of the Code the doctrine of notice does not apply. In *Halsbury's Laws of Malaysia* (Vol 8) at para [150.191], the effect of fraud vis-a-vis indefeasibility of title under the Code is explained as follows:

> The Sarawak Land Code provides that any issue document of title or entry or alteration in the Register procured or obtained by fraud will be void as against the person defrauded or who may be defrauded thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, must take any benefit therefrom. It does not, however, make defeasible the title of a successor in title to a party who was guilty of fraud, or a party or privy to fraud; instead so long as that successor is able to claim that he acted in good faith and for value, his title is indefeasible not only against his predecessor's fraud but also against error or misdescription.
>
> Once the doctrine of notice has been abrogated, then the fraud to which this provision refers must be actual fraud.

[23] The indefeasibility of title is not defeated by the illegality of the document or instrument of title (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241). In my view under the Code registration by void instrument does not affect indefeasibility of title. Unlike s 340 of the National Land Code ('NLC') which is applicable in Peninsular Malaysia, s 132 of the Code does not have the equivalent of s 340(2)(b) of NLC. The latter clearly provides that registration obtained by void instrument could not confer indefeasibility of title on the registered proprietor. Under the Torrens System, which applies to the Code, the Register is everything. It was decided in *Frazer v Walker & Ors* [1967] 1 All ER 649 that registration was effective to vest title in registered proprietor notwithstanding that he acquired his interest under an instrument that was void. In a book *Introduction to Land Law* by

Hinde and McMorland, (2nd Ed, 1986) (Butterworth) at p 82 the following passage is found:

> The effect of the Privy Council advice in *Frazer v Walker* was summarised by Barwick CJ in *Breskvar v Wall* as follows:
>
> 'The Torrens system of registered title … is not a system of registration of title but a system of title by registration. The title … [which the certificate of title] certifies is not historical derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer vs Walker* of the decision of the Supreme Court of New Zealand in *Boyd v Mayor of Wellington* now places that conclusion beyond question … '.

[24] The law therefore is well settled: that the registration conferred on the registered proprietor an indefeasibility of title. In so far as it relates to the Sarawak Land Code it is manifested in s 132. Though the indefeasibility of title may be challenged on the ground of fraud, such ground cannot be used to defeat a title acquired by a registered bona fide purchaser and for value. This is my view and is plain from the reading of s 134(2) which states as follows:

> Nothing in this Code shall be construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claim was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise.

[25] On the facts of the instant case, there is no allegation of fraudulent act by the first defendant in obtaining title to the said land. What is alleged against the first defendant is that the instrument by which she acquired the title through registration of the MOT that was improper and illegal. In my view, however, such allegation cannot, in the light of ss 133 and 134(2) of the Code be held against the first defendant whose claim that she was a bona fide purchaser for value has not been challenged. It is also my opinion that the combined effect of ss 132(1), 134(1) and 133(1) of the Code is that fraud, if proven, is the only ground that can defeat a registered proprietor's title. Isay so because fraud is the express exception in ss 132(1) and 133. Under s 134(1), any issue document of title obtained by fraudulent means or any altercation or entry in the Register made by a fraudulent act is void against the person defrauded.

[26] Since no fraud is alleged against the first defendant, I conclude, therefore, that the first defendant, as registered proprietor has a good and indefeasible title to the said land. In the circumstances I hold that the plaintiff's second prayer ought to be denied.

[27] For the above mentioned reasons, I make the following orders:

a) that the plaintiff's prayer (a) is granted to the extent that the power of attorney instrument no. L2413/1999 (the first PA); the deed of substitution

of power of attorney instrument no. L2195/2000 (the second PA); and the power of attorney instrument no. L5706 (the third PA) are hereby declared illegal, null and void and of no effect;

b) that the first defendant has acquired an indefeasible title to the subject land upon the registration of the memorandum of transfer;

c) that the plaintiff's prayer (b) is denied.

[28] I further order that each party pays its own costs.

Plaintiff's application partly allowed.

Reported by Mohd Nizam Hamdan